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Supreme Court of the United States

OCTOBER TERM, 1945

MURRAY WINTERS,

Defendant-Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

**APPELLANT'S MEMORANDUM IN OPPOSITION
TO APPELLEE'S MOTION TO DISMISS
OR AFFIRM**

ARTHUR N. SEIFF,

Attorney for Defendant-Appellant.

INDEX

	PAGE
Question Involved on This Motion	1
Analysis of the Statute Involved	2
Argument	4
Conclusion	8

TABLE OF CASES CITED:

American Federation of Labor v. Swing, 312 U. S. 321, 325	4
Chaplinsky v. New Hampshire, 315 U. S. 568, 571-572....	4, 5
Colon v. Lisk, 153 N. Y. 188, 196-197	4
Ex parte Harrison, 212 Mo. 88, 92-93	4, 5
Follette v. Town of McCormick, 64 Sup. Ct. 717, 718	4
Herndon v. Lowry, 301 U. S. 242, 258	4
Martin v. Struthers, 319 U. S. 141, 151	4, 7
Murdock v. Pennsylvania, 319 U. S. 105, 115	4
Murphy v. Commonwealth, 172 Mass. 264, 273	6
People ex rel. Alpha P. C. Co. v. Knapp, 230 N. Y. 48, 54	6

	PAGE
Schneider v. State, 308 U. S. 147, 161	4
State v. McKee, 73 Conn. 18, decided in Connecticut in 1900	2
Stromberg v. California, 283 U. S. 359, 364-365	4, 5, 6
Thornhill v. Alabama, 319 U. S. 88, 97	6
Williams v. North Carolina, 217 U. S. 287	5, 6
Wynehamer v. People, 13 N. Y. 378, 424-425, 440-442....	6

OTHER AUTHORITIES CITED:

Penal Law, State of New York:

Section 1141, subdivision 2	1, 2, 3, 6, 7, 8
subdivision 1	3, 8

Sections 1140, 1140a, 1140b, 1141a, 1142, 1142a, 1143, 1145, 1146, 1148	7
--	---

Constitution of the United States:

Fourteenth Amendment	2
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APPELLANT'S MEMORANDUM IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Question Involved on This Motion

This memorandum is submitted in opposition to appellee's motion to dismiss this appeal, or in the alternative, to affirm the judgment appealed from. Appellee argues that no substantial constitutional question is involved. It is appellant's contention that a substantial, important, and novel constitutional question is involved that should be passed upon by this Court.

The statute (Penal Law, State of New York, Section 1141, subdivision 2) under which appellant was convicted provides:

"A person . . . who . . .

2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed

paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; * * *

* * * * *

Is guilty of a misdemeanor * * * .”

Appellant contends that this statute, and his conviction thereunder, are in violation of the Fourteenth Amendment of the Constitution of the United States. That this contention was urged in all the courts below, and that those courts necessarily passed thereon, is shown in the record of this case on file in the office of the Clerk of this Court. To avoid repetition, and to avoid unnecessarily extending this memorandum, appellant respectfully refers this Court to the jurisdictional statement on file. It will also be noted therefrom that the appellate courts of the state of New York thought this question sufficiently important to write lengthy opinions, and that the Chief Judge of the Court of Appeals of the State of New York dissented from the affirmance on the ground that “the statute, as construed by the court, is so vague and indefinite as to permit punishment of the fair use of freedom of speech.” In addition, it took the Court of Appeals more than six months to decide the case after the argument thereof.

A question of freedom of the press is involved. The statute in question has never been passed upon in this Court, or in any court of any state of the United States other than in this case and in the case of *State v. McKee* (73 Conn. 18) decided in Connecticut in 1900.

Analysis of the Statute Involved

There are certain salient features regarding the statute that should be noted:

(a)

It has been conceded by the appellee in all the courts of the state of New York that there is no issue of obscenity in this case.

The charge and conviction against appellant are not under subdivision 1 of section 1141 which bans obscene literature, but under subdivision 2 of that section which is directed against publications devoted to criminal news, police records, or accounts of criminal deeds, etc.

An examination of subdivision 2 shows that it is not complementary to subdivision 1; that it applies to an entirely different and distinct type of writings, namely, those dealing with crime.

The parties to this appeal have always agreed on this point, and that the application of the rule of *ejusdem generis* to subdivision 2 shows this clearly.

(b)

The classifications prohibited by subdivision 2 are in the disjunctive—"criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime"—so that a publication devoted to any one of these classes comes within the condemnation of the statute.

(c)

The statute makes no distinction between truth, fiction, or statistics. All come within its condemnation equally, provided they consist of "criminal news" or "police reports" or "accounts of criminal deeds". Parenthetically, it has never been denied that the magazines involved in this case contain "true cases of crimes from police records and files".

(d)

Although the statute in question was enacted in 1884, this appears to be the first prosecution thereunder. That statute appears never to have been applied or tested heretofore. There appears to be no "clear and present danger" to which the statute was addressed.

ARGUMENT

It is freedom of the press, which is "in a preferred position" (*Murdock v. Pennsylvania*, 319 U. S. 105, 115; *Follette v. Town of McCormick*, 64 Sup. Ct. 717, 718), and which is "to be guarded with a jealous eye" (*American Federation of Labor v. Swing*, 312 U. S. 321, 325), that is involved.

Appellant contends that the statute constitutes repression rather than regulation; that even in regulation the power to restrict is the exception rather than the rule; and that the statute constitutes a type and degree of repression beyond the power of the legislature. (*Martin v. Struthers*, 319 U. S. 141, 151; *Schneider v. State*, 308 U. S. 147, 161; *Herndon v. Lowry*, 301 U. S. 242, 258; *Chaplinsky v. New Hampshire*, 315 U. S. 568; 571-572; *Ex parte Harrison*, 212 Mo. 88, 92-93; *Colon v. Lisk*, 153 N. Y. 188, 196-197.

Since the statute is in the disjunctive, this raises the question of the validity not merely of the statute taken as a whole, but of each one of the various classes of publications made a crime.

Stromberg v. California, 283 U. S. 359, 364-365.

The judgment of conviction against appellant was a general one. It did not specify the classification within the

statute upon which it rested. As there are several distinct classifications set forth in the statute, and the trial court might have convicted with respect to any one of them, independently considered, it is impossible to say under which one the conviction was obtained. If any one of the classifications of the statute is invalid under the constitution, the conviction cannot be upheld.

Stromberg v. California, 283 U. S. 359, 367-368;
Williams v. North Carolina, 317 U. S. 287.

The statute is comprehensive with respect to the classifications of publications it proscribes. Those classifications are general and all-inclusive. The statute contains no exceptions or limitations in its application to writings falling within any of the classifications therein specified. It makes no attempt at regulation or discrimination. It is not regulation—it is repression. Its character is such that it strikes at the very foundation of freedom of the press by arbitrarily outlawing an entire class of long-recognized literature.

Assuming *arguendo* that it might have been competent for the legislature to have passed an act to operate upon certain types or degrees of crime literature as such (this we dispute because of the holdings in *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571-572 and *Ex parte Harrison*, 212 Mo. 88, 92-93), the act before this Court makes no distinction whatever. It operates equally upon all literature falling within any one of the classifications therein enumerated. Its provisions are arbitrary. It is a dragnet which may enmesh anyone who publishes or sells crime literature. Its language is unambiguous and furnishes a readily ascertainable standard of guilt—it condemns any publication devoted to and principally made up of criminal news or police reports or accounts of criminal deeds, re-

ardless of the manner of treatment. Even the right to publish the truth is not respected. The statute does not recognize any defense based upon any distinction, but condemns all.

No conviction under the statute can stand.

Thornhill v. Alabama, 310 U. S. 88, 97;
People ex rel. Alpha P. C. Co. v. Knapp, 230 N. Y. 48, 54;
Murphy v. Commonwealth, 172 Mass. 264, 273;
Wynehamer v. People, 13 N. Y. 378, 424-425, 440-442.

The language of subdivision 2 being plain, unambiguous, and imperative, there is nothing for the courts to do but obey it to its full extent, if constitutional, or strike it down, if unconstitutional. What would happen if it were to be enforced to its full extent demonstrates its unreasonable repressiveness.

A statute which on its face is so broad as to permit the punishment for fair use of freedom of the press is repugnant to the constitutional guaranties. This statute would permit punishment for the publication of police reports alone, or criminal news alone, as well as accounts of criminal deeds, or any of the other prohibited matters. It does not make provision for the publication of truth or statistics, or concern itself with the manner of treatment of the writing. It therefore is invalid, and the conviction thereunder must be reversed.

Stromberg v. California, 283 U. S. 359, 369;
Williams v. North Carolina, 317 U. S. 287, 292.

We are not dealing with a statute properly limited in its scope, but with a statute so broad and all-inclusive as

to constitute so stringent a prohibition that it comes within the condemnation of the Constitution. The outright prohibition by subdivision 2 of any publication falling within any of the specified classes of publications renders the statute invalid.

In *Martin v. Struthers*, 319 U. S. 141, it was held, at page 151:

"The fact that some regulation may be permissible, however, does not mean that the First Amendment may be abrogated. We are not dealing here with a statute, 'narrowly drawn to cover the precise situation' that calls for remedial action (cts.). * * * Prohibition may be more convenient to the law maker, and easier to fashion than a regulatory measure * * *. But that does not justify a repressive enactment like the one now before us."

This is particularly so because freedom of the press is a right not lightly to be taken away.

It should be noted that there is no need for such a statute. The provisions of subdivision 1 of section 1141 are broad enough to encompass any and all writings and pictures of an indecent nature.

The very provisions of the New York Penal Law referred to by appellee (sections 1140, 1140-a, 1140-b, subdivision 1 of 1141, 1141-a, 1142, 1142-a, 1143, 1145, 1146, 1148), when contrasted with the statute involved in this case (subdivision 2 of section 1141), bring out all the more forcibly the vagueness and all-inclusiveness of the latter statute. All the other statutes describe specific acts and particularize with descriptive adjectives those acts, whereas subdivision 2 of section 1141 does not do so. On the contrary, it embraces all publications devoted either to crim-

inal news, or police reports, or accounts of criminal deeds, etc., regardless of whether the same are factual, fictional, or statistical.

The construction placed on subdivision 1 of section 1141, as set forth in appellee's memorandum stems from the many adjectives used in that subdivision, namely, "obscene, lewd, lascivious, filthy, indecent or disgusting", whereas subdivision 2 refers generically to "criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime", which, considering the rule of *ejusdem generis*, and the fact that the statute is in the disjunctive, completely differentiates it from subdivision 1.

The statute on its face is unconstitutional, and a reading thereof shows that its aim is all-inclusive rather than limited, as argued by appellee.

Finally, the rule as contended for by appellee, regarding the power of the states to limit freedom of the press is not as broad as appellee contends. In any event, that right is one of regulation, proper regulation, not repression.

IN CONCLUSION,

it is respectfully submitted that appellee's motion be denied, and that this Court take jurisdiction of this case.

ARTHUR N. SEIFF,
Attorney for Defendant-Appellant.

